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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

DEC 09 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. Any appeal or motion must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer mortgage software company. It seeks to employ the beneficiary permanently in the United States as a software developer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree, because the ETA Form 9089 indicated that the alternative educational requirement for the proffered position was a bachelor's degree with three years of work experience.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

On appeal, counsel asserts that the director denied the petition because the ETA Form 9089 contained alternate requirements of a bachelor's degree and thus did not satisfy the requirements for the EB-2 visa preference classification. Counsel notes that the director's decision fails to take into consideration the fact that the regulations allow three separate eligibility requirements for the EB-2 visa preference classification: a professional holding an advanced degree; the equivalent of a professional holding an advanced degree (a bachelor's degree with five years of work experience);

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[1] The AAO notes that the petitioner filed a subsequent I-140 petition (LIN [redacted] with a new ETA Form 9089 that indicates minimum academic requirements of a master's degree in computer science. This petition was approved on April 16, 2010.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

or an alien of exceptional ability. Counsel states that the director erred in assuming that the petitioner must establish more than one of these three requirements. Counsel states that in the instant matter the beneficiary has a master's degree, and that the beneficiary will occupy a position that meets the definition of a profession that appears on Appendix D of the Department of Labor's PERM Rule. Counsel states that the Department of Homeland Security requirements for second preference visa preference classification and the DOL rules allowing for alternate requirements for the same occupation listed on a labor certification application are entirely different concepts.

It is unclear what legal principle counsel is attempting to convey with this statement. The United States Citizenship and Immigration Services (USCIS) is bound by the regulatory definition at 8 C.F.R. § 204.5(k)(2), when adjudicating advanced degree preference petitions.

Counsel states that an employer may put alternate requirements on the job offer position of the labor certification and that under the Board of Alien Labor Certification Appeals (BALCA) based on the Kellogg[3] rule, the alternate requirements must be substantially similar to the primary requirements. Counsel refers to the following Kellogg language "Employer will accept any suitable combination of education, training or experience, as "the Magic Language." However, as previously noted, the DOL regulations requiring the use of this language do not apply to this case. Counsel states that the employer may follow the Kellogg rule that alternative requirements must be substantially similar or the PERM rules that alternative requirements must be suitable; however, in neither of these hypotheses does the petitioner have to state the requirements in some kind of mathematical balance.

Counsel furthers states that the DOL *O*Net* that replaced the Dictionary of Occupational Titles, gives job synopses to describe entry level requirements for each occupation and uses more fluid terms like "several years experience" and "some employers require degrees" instead of the more rigid USCIS approach. Counsel also incorporates the text of a USCIS interoffice memorandum written by [redacted][4] into his brief. Counsel, however fails to note that the labor certification in question contains an alternate requirement of a bachelor of science and three years of work experience. In no circumstances will such a combination of education and experience meet the minimum requirements for an EB-2 visa preference classification. Thus, the appeal must be dismissed.

For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

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[3] Counsel's reference to the Kellogg language is misplaced. Because the petitioner does not require the proffered job based on the alternative requirements and the beneficiary is not relying on such a requirement, the Kellogg language is irrelevant in these proceedings.

[4] Memorandum from [redacted], Acting Associate Commissioner, Office of Programs, and [redacted], Deputy Executive Associate Commissions, Office of Field Operations, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants,* AD00-08, March 20, 2000.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.) This regulation provided the legal basis for the director's ultimate conclusion.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree in computer science is the minimum level of education required. Part H, lines 7 and 7-A indicates that additional fields of electrical engineering and electronics or a related field are also acceptable. Line 8 reflects that a bachelor's degree with three years of work experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Thus, based on the plain language of the labor certification, the petitioner would accept as qualified an individual with less than a master's degree or the regulatory defined alternative of a bachelor of science degree with five years of work experience for the proffered position.

The record contains a copy of the beneficiary's master's degree in computer science from the University of Denver, Denver, Colorado, an accredited U.S. academic institution.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

Thus, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate or the foreign equivalent. The petitioner indicated that a master's degree was the minimum education required. The AAO notes that the petitioner's alternative requirement of a bachelor of science degree with three years of work experience makes the instant labor certification an EB-3 visa preference classification, not an EB-2 visa preference classification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Contrary to counsel's assertions, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (an agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

In the instant matter, the beneficiary does have a U.S. Master's degree and does qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does meet the job requirements on the labor certification. However, as stated previously, the petitioner has not established that the proffered position requires an advanced degree. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.